FILED
JUL 23 2001
OFFICE OF THE CLERK

No. 01 134

In The

Supreme Court of the United States

JAMES D. ABBOTT,
a/k/a John Jasper Roberson,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

1) **Did the District Court Err by Denying the Petitioner's Motion to Suppress Evidence When the Traffic Stop of the Car the Petitioner Rode in as a Passenger was Pretextual?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CITATIONS OF PRIOR OPINIONS

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to the Petition and is unpublished (*U.S. v. Abbott,* Unpublished Op. No. 00-4572, Submitted January 16, 2001, Decided March 19, 2001). (Appendix A).

JURISDICTIONAL STATEMENT

This Petition seeks review of an opinion and order affirming Petitioner's guilty plea that was entered on March 19, 2001 (Appendix A). Petitioner, as a condition of his guilty plea, received permission to appeal Constitutional issues arising from his case (Appendix B). On March 26, 2001, Petitioner filed a timely petition for panel rehearing (Appendix C). The panel denied Petitioner's petition for rehearing by order dated April 23, 2001 (Appendix C). Jurisdiction to review this case on writ of ***certiorari*** is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of the Fourth (4th) Amendment to the United States Constitution and its relation to South Carolina statutory law concerning an improper lane change. The relevant portion of the Fourth Amendment to this case reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

The Petitioner was arrested as the result of a traffic stop in South Carolina in which the driver of the car was given a warning for an improper lane change. The Petitioner rode in the car as a passenger. South Carolina's improper lane change statute reads as follows:

> "Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single land and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety."

S.C. Code Ann. §56-5-1900(a) (Supp. 1999).

STATEMENT OF THE CASE

This Petition arises from the District Court's Final Judgment and Sentencing Order dated July 30, 2000. The Petitioner (hereinafter referred to as "Abbott") pled guilty to one count of possession with intent to distribute ("PWID") cocaine, a violation of 21 U.S.C. §841(a)(1). The District Court sentenced Abbott to sixty-three (63) months imprisonment (In an amended Sentencing Order received by Abbott's counsel on October 3, 2000, the District Court approved drug counseling and treatment for Abbott while Abbott served his sixty-three (63) month sentence). The Government (hereinafter referred to as "USA") agreed that Abbott could appeal any alleged Constitutional violations that occurred in his case.

The USA arrested Abbott on December 16, 1999. The arrest stemmed from a traffic stop conducted by the South Carolina Highway Patrol (hereinafter referred to as "SCHP") on December 14, 1999, less than two (2) miles inside the South Carolina-Georgia state line. Abbott, a passenger in a rental car driven by Lina Fuller (hereinafter referred to as "Fuller"), was arrested, along with Fuller, for PWID cocaine and possession of marijuana. The SCHP searched the rental car and found the cocaine, as well as a small amount of marijuana.

The USA charged Abbott with PWID cocaine under 21 U.S.C. §841(a)(1). The District Court maintained federal jurisdiction over this matter pursuant to the Controlled Substances Act, 21 U.S.C. §801 *et seq.* On December 17, 1999, the District Court set bond for Abbott at $2,000,000.00 surety.

Abbott filed assorted motions, including a motion to suppress evidence on March 22, 2000. Abbott filed a memorandum in support of his motion to suppress evidence on March 23, 2000. Abbott claimed the SCHP's traffic stop was pretextual, the SCHP had no reasonable suspicion of drug activity and the SCHP's search of Abbott and the rental car was illegal.

The evidence produced at Abbott's suppression hearing indicated that Trooper Robinson (the "SCHP" patrolman who made the arrest) claimed Fuller made an improper lane change. Robinson testified that Fuller's vehicle edged "seven to eight inches" into the emergency lane while driving along I-85 (the route driven by Fuller from Atlanta, Georgia to Spartanburg, South Carolina). Robinson also admitted that he decided to stop Fuller's car because he suspected drug activity when he saw Fuller's car edge into the emergency lane. In addition, once the officer had completed his "improper lane change" investigation without any evidence of drug use or illegal activity, he continued to proceed with a drug interrogation.

ARGUMENT

I. The District Court Erred By Denying Abbott's Motion To Suppress Evidence

A. Standard of Review

The District Court's denial of Abbott's Motion to Suppress Evidence considers both the facts of the present case and the applicable law at issue. Mixed questions of law and fact are evaluated under a hybrid standard. This Court reviews the lower court's findings of historical fact for clear error and the determination of reasonable suspicion *de novo*. *Ornelas v. U.S.*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

B. Applicable Law At Issue

Abbott argues that Trooper Robinson's stop of Fuller's car and his questioning was pretextual. As a result, the cocaine seized out of Fuller's car must be suppressed. Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of a person within the meaning of the Fourth (4th) Amendment. *Delaware v. Prouse,* 440 U.S. 648, 653. 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979). Robinson's traffic stop of Fuller's car and his investigation must be justified by probable cause or a reasonable suspicion, based on specific and articulable facts of unlawful conduct. *U.S. v. Hassan El,* 5 F.3d. at 729.

The reasonable suspicion standard requires an officer to have a reasonable suspicion that criminal activity is afoot before he may conduct a brief investigatory stop of a person, *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d. 889 (1968). The reasonable suspicion standard requires a minimal level of objective justification for the

police action. The government possesses the burden to articulate facts sufficient to support reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 684, 145 L.Ed. 2d. 570 (2000). The officer's reasonable suspicion determination does not depend upon any one factor, but upon a totality of the circumstances. *Sokolow*, 490 U.S. at 8.

Although Abbott rode as a passenger in Fuller's car, he may challenge the initial stop of Fuller's car by the SCHP. *U.S. v. Rusher*, 966 F.2d. 868, 874, n. 4 (4th Cir. 1992).

C. Based Upon The Adduced Facts, Trooper Robinson's Stop Of Fuller's Car Was Pretextual And The Cocaine Found In The Trunk Must Be Suppressed

The traffic stop initiated by Trooper Robinson forms Abbott's sole issue for appeal. Even if Trooper Robinson saw Fuller's car move toward the emergency lane, the trooper admitted Fuller's car drove at most into the emergency lane "a little bit." Robinson defined "a little bit" as "seven to eight inches. The whole car didn't go into the emergency lane." Robinson decided to give Fuller a warning ticket for an improper lane change. Robinson finally admitted that he had already determined that "something is happening here that ain't right" when he stopped Fuller's car. Robinson also testified that if Fuller drove one inch into the emergency lane, "its not right."

S.C. Code Ann. §56-5-1900(a) (Supp. 1999) defines an improper lane change as follows:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all other consistent herewith shall apply:
>
> a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety.

In the present case, the evidence shows Fuller's car, at most, edged briefly into the emergency lane. Fuller never tried to pass another vehicle or change lanes.

Using *Hassan El's* objective standards test, Robinson lacked both probable cause and reasonable suspicion to stop Fuller's car. Fuller did not make an improper lane change according to S.C. Code Ann. §56-5-1900(a). Robinson used a pretext to stop Fuller's car because, as Robinson admitted, he had already determined that "something is happening here that ain't right." Robinson's testimony clearly shows the truth of Abbott's argument, that the traffic stop was pretextual.

Other circuits have held that this type of justification for a traffic stop is pretextual. In *U.S. v. Gregory*, 79 F.3d. 973 (10th Cir. 1996), the officer stopped the defendant for an improper lane change when the defendant crossed two feet over into the emergency lane. *Gregory*, 79 F.3d at 975-6. The Tenth Circuit reviewed the language of Utah's improper lane change statute. Utah Code Ann. §41-6-61(1) (1988) states "on a roadway divided into two or more clearly marked lanes for traffic the following provisions apply:

(1) A vehicle shall be operated as nearly as practical entirely within a single lane and may not be moved from the lane until the operator has determined the movement can be made safely."

The Utah statute is similar to the South Carolina improper lane change statute. The Tenth Circuit determined the phrase "as nearly as practical" made the traffic stop pretextual, *Id* at 978, basing its holding on several factors, including the weather, road conditions, possible changes in the driver's thinking, a lack of danger to other traffic, and the fact that crossing into the emergency lane was an isolated incident. *Id.* In *U.S. v. Miller*, 821 F.2d 546 (11th Cir. 1987), the Eleventh Circuit found a traffic stop to be pretextual when a highway patrolman stopped a car which passed other vehicles to the left, returned to the right lane, and crossed into the emergency lane about four inches. *Miller,* 821 F.2d at 547. The Eleventh Circuit found these facts, as well as the trooper's testimony that the defendant's car would have been stopped anyway, made the stop pretextual. *Id* at 549.

These Circuits use the reasonable stop test. *Hassan El,* 5 F.3d at 729. However, even using the objective standards test, Robinson made a pretextual stop. Fuller did not affect traffic, did not habitually drive into the emergency lane, and did not give rise to suspicious criminal activity. Using the criteria set forth in §56-5-1900(a), Fuller drove "as nearly as practicable" in the right lane and edged into the emergency lane only once, briefly, without endangering herself or other traffic. Trooper Robinson "had a hunch" and admitted that he already made up his mind that something was happening that "ain't right" so he stopped Fuller's car. No traffic violation actually occurred.

Robinson's stop of Fuller's car was pretextual as articulated by *Hassan El.* Robinson used a legal justification (improper lane change) as a pretext to search Fuller's car for

drugs. Robinson lacked reasonable suspicion to legally stop Fuller's car. Fuller did not make an improper lane change. The evidence shows Fuller drove as nearly as practicable in the right lane. Because Robinson's initial stop of Fuller's car was illegal, the seized contraband must be excluded under the "fruit of the poisonous tree" doctrine. *Rusher*, 966 F.2d at 875.

This Court must respectfully find that the District Court erred in refusing to suppress the cocaine found in the trunk of Fuller's car. Robinson found this evidence as the result of an improper, pretextual stop. Abbott's Fourth Amendment rights were violated. As a result, Abbott's guilty plea must also be overturned and the case remanded to the District Court with instructions to suppress the cocaine found in the trunk of Fuller's car.

CONCLUSION

For the reasons listed above, Abbott respectfully requests that this Court reverse Abbott's guilty plea and the District Court's Sentencing Order, suppress the cocaine seized during the pretextual traffic stop by the SCHP, and remand this matter back to the District Court.

Respectfully submitted,
JAMES D. ABBOTT
By Counsel

J. Stephen Welch (SC Bar #13153)
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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-4572

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

JAMES D. ABBOTT,
a/k/a John Jasper Roberson,
Defendant - Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Anderson.
Margaret B. Seymour, District Judge.
(CR-00-106)

Submitted: January 16, 2001
Decided: March 19, 2001
Entered: March 19, 2001

Before WILKINS, WILLIAMS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

J. Stephen Welch, L.A. Smokey Brown, Jr., THE WELCH LAW FIRM, P.C., Greenwood, South Carolina, for Appellant. J. Rene Josey, United States Attorney, Isaac Johnson, Jr., Assistant United States Attorney, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

James D. Abbott appeals the district court's April 12, 2000, denial of his motion to suppress evidence seized from a rental car in which he was a passenger.

We hold the district court did not err in concluding the evidence was admissible, and we affirm on the reasoning the court articulated at the hearing on motion to suppress the evidence. See Whren v. United States, 517 U.S. 806, 813 (1996); United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993).

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid in the decisional process.

AFFIRMED

APPENDIX B

Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
District of South Carolina

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Entered July 31, 2000

UNITED STATES OF AMERICA

CASE NUMBER: 8:00-106-1

v.

JAMES ABBOTT,
a/k/a John Jasper Roberson.

J. Stephen Welch, Retained
Defendant's Attorney

THE DEFENDANT:

- ■ pleaded guilty to count(s) One (1) on April 18, 20000
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court. -
- ☐ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	**Nature of Offense**
21:841(a)(1)	Please see indictment
Date Offense Concluded	**Count Number(s)**
12/14/99	One (1)

The defendant is sentenced as provided in pages 2 through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's So. Sec. No.: **579-64-1213**	**July 26, 2000** Date of Imposition of Judgment
Defendant's Date of Birth: **01/17/49**	\s\ **Margaret B. Seymour** Signature of Judicial Officer
Defendant's USM No.: **96242-071**	**Margaret B. Seymour, USDJ** Name and Title of Judicial Officer
Defendant's Mailing Address **7 Darby Hill Lane Greer, SC 29651**	**July 30, 2000** Date

DEFENDANT: JAMES ABBOTT,
a/k/a John Jasper Roberson.
CASE NUMBER: 8:00-106-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **Sixty-three (63) month(s).**

The defendant shall pay a $100.00 special assessment fee.

The Defendant shall participate in the Bureau of Prisons Inmate Financial Responsibility Program.

- ☐ The court makes the following recommendation to the Bureau of Prisons
- ■ The defendant is remanded to the custody of the United States Marshal:
- ☐ The defendant shall surrender to the United States Marshal for this district:
  - ☐ at a.m./p.m. on
  - ☐ as notified by the United States Marshal
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ☐ before 2 p.m. on
  - ☐ as notified by the United States Marshal
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

DEFENDANT: JAMES ABBOTT,
a/k/a John Jasper Roberson.
CASE NUMBER: 8:00-106-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years.**

1) The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as defendant is released from the program by the probation officer.

2) The defendant shall pay any unpaid balance of the $100.00 special assessment fee.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the special conditions on the Special Conditions of Supervision Page.

STANDARD CONDITIONS OF RELEASE

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

DEFENDANT: JAMES ABBOTT,
a/k/a John Jasper Roberson.
CASE NUMBER: 8:00-106-1

CRIMINAL MONETARY PENALTIES

The defendant will make all checks and money orders payable to the "**Clerk, U.S. District Court**" unless otherwise directed by the court.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$100.00**	**$[Fine (no $)]**	**$[Restitution (no $)]**

☐ If applicable, restitution amount ordered pursuant to plea agreement **$ [Amount re: plea agreement]**

FINE

The above fine includes costs of incarceration and/or supervision in the amount of **$[Costs of incarc/superv (no $)]**

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612(g).

☐ The court has determined that the defendant does not have to ability to pay interest and it is ordered that:

- ☐ The interest requirement is waived.
- ☐ The requirement is modified as follows:

RESTITUTION

The defendant shall pay interest on any restitution of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612(g).

☐ The court has determined that the defendant does not have to ability to pay interest and it is ordered that:
- ☐ The interest requirement is waived.
- ☐ The requirement is modified as follows:

☐ The determination of restitution is deferred until [Deferred until...]. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution on the following payees in the amounts listed below. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless other wise in the priority order or percentage payment column below.

Name & Mailing Address of Payee	****Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order of Percentage of Payment**
Totals:	$0.00	$0.00	

** Findings for the total amount of losses are required under Chapters 109A, 110, 100A , and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JAMES ABBOTT,
a/k/a John Jasper Roberson.
CASE NUMBER: 8:00-106-1

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. ■ in full immediately; or
B. ☐ $[Amount due immediately no $)] immediately, balance due [in accordance with C, D, or E]; or
C. ☐ not later than [Not later than]; or
D. ☐ in installments to commence [Installment starts ? days] day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court establish a payment schedule if appropriate; or
E. ☐ in [Equal weekly, monthly, quarterly] installments of $[Installment amount [no $] over a period of [How many years] year(s) to commence [E - Installments start ? days] day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instruction regarding the payment of criminal monetary penalties:
[Special instructions]

☐ Joint and Several
Case Number
(Including Defendant Number) Defendant Name

Joint and Several
Amount

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons; Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: JAMES ABBOTT,
a/k/a John Jasper Roberson.
CASE NUMBER: 8:00-106-1

STATEMENT OF REASONS

Information on this page reflects ranges under Sentencing Guidelines and is used for statistical purposes only. Please refer to other pages in the judgment for the actual sentence.

■ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The Court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary): **see attached.**

Guideline Range Determined by the Court:

Total Offense Level:	**25**
Criminal History Category:	**II**
Imprisonment Range:	**63 to 78 months**
Supervised Release Range:	**4 to 5 years**
Fine Range:	**$ to $**

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii)

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996 that require a total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payments of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that exceeds 24 months, and the sentence is imposed for the following reasons:

OR

■ The sentence departs from the guideline range:

■ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reasons:

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-4572
CR-00-106

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES D. ABBOTT,
a/k/a John Jasper Roberson,

Defendant - Appellant

ORDER

Entered April 23, 2001

Appellant has filed a petition for rehearing.
The Court denies the petition for rehearing.

For the Court,

\s\

Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
OCT 17 2001
OFFICE OF THE CLERK

No. 01-134

In the Supreme Court of the United States

JAMES D. ABBOTT,
A/K/A JOHN JASPER ROBERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Counsel of Record
MICHAEL CHERTOFF
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QUESTION PRESENTED

Whether an officer's stop of a vehicle in which petitioner had been a passenger violated the Fourth Amendment.

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In the Supreme Court of the United States

No. 01-134

JAMES D. ABBOTT,
A/K/A JOHN JASPER ROBERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 246 F.3d 668 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2001. An order denying rehearing was entered on April 23, 2001. Pet. App. C1. The petition for a writ of certiorari was filed on July 23, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of South Carolina to possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 63 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A2.

1. On December 14, 1999, Trooper David Robinson —a 14-year veteran of the South Carolina Highway Patrol—observed the vehicle in front of him on Interstate 85 cross from the right lane about seven or eight inches into the emergency lane, then back again. Robinson stopped the car under the authority of South Carolina Code Annotated § 56-5-1900(a) (Law Co-op. 1991), which requires that a vehicle "be driven as nearly as practicable entirely within a single lane." The stop and the ensuing conversation between Robinson and Linda Fuller, the driver, and petitioner, a passenger, was videotaped. C.A. App. 25-26, 35-37, 43-44; Gov't C.A. Br. 2, 4.

Robinson explained why he had stopped them and asked Fuller for her license and registration. As he did so, he smelled burnt marijuana in the car. Since the car was rented, he asked petitioner and Fuller where they had driven from and their destination. They replied that they had been in Atlanta overnight and were headed to Spartanburg. Petitioner said he had been looking for a job in Atlanta; Fuller said she had been house-hunting there. From his experience and training, Robinson knew Atlanta to be a source of drugs, and he knew Interstate 85 to be a route used by drug traffickers. Robinson unsuccessfully sought consent to search the car. He then called the Highway Patrol for a drug-

detecting dog to be brought to the scene to sniff the car's exterior. While waiting for the dog to arrive, he asked Fuller and then petitioner to exit the vehicle, and patted them down for weapons. Fuller seemed nervous; she kept turning and looking back toward the car. Both before and after Fuller got out of the car, petitioner moved around inside it; with his left arm, he reached over the seat into the floorboard area behind the driver's seat. C.A. App. 26-30, 33-34, 38-39, 46, 48; Gov't C.A. Br. 2-3.

Outside the car, Fuller asked for her jacket. Robinson said that he could not let her re-enter the vehicle, but that with her permission, he would retrieve the jacket for her. She agreed, and Robinson got the jacket, which was between the console and her seat. He again smelled burnt marijuana in the car. After checking the jacket for weapons, he handed it to her and asked her if there was any marijuana in the car or if anyone had smoked some there. Fuller admitted that she had smoked half of a marijuana cigarette earlier that day and that the other half was still in the car. After relating this to a backup officer who had by then arrived at the scene, Robinson searched the vehicle and found the marijuana cigarette. In the backseat, he found a bag that contained handfuls of small plastic baggies and 21 pills. In the trunk, he found two kilograms of cocaine. Fuller and petitioner were arrested and charged with possessing marijuana and cocaine with intent to distribute them.[1] Fuller was separately issued a warning ticket for her traffic offense. C.A.

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[1] At petitioner's plea hearing, the government amended the indictment, with petitioner's consent, to charge only cocaine. Plea Tr. 18-19.

App. 30-32, 42-43, 45-46; Gov't C.A. Br. 3; Def.'s Br. in Supp. of Mot. to Suppress at 2.

2. The district court denied petitioner's motion to suppress. C.A. App. 63-66. The court found that the stop "for an improper lane change was permissible" because "the trooper perceived that the vehicle moved into the emergency lane which is not a driving lane." *Id.* at 63. The court further concluded that "there is no intrusion on the Fourth Amendment" regardless of the seriousness of the traffic violation and "even if the officer would not have made the stop but for some hunch or some inarticulable suspicion of other criminal activity." *Ibid.* The court explained that the test for a valid stop is an objective one, requiring only probable cause or reasonable suspicion. *Ibid.*

The court determined that "the trooper had a reasonable articulable suspicion to detain the defendant[s] * * * after issuing a warning for the traffic violation." C.A. App. 64. The court credited the testimony of Trooper Robinson, an experienced officer, that he smelled marijuana when he first approached the vehicle, especially in light of Fuller's admission that she had smoked marijuana earlier that day and that part of a marijuana cigarette was in the car. *Ibid.*

The court further found that even if, as petitioner argued, Trooper Robinson did not smell burnt marijuana until he retrieved Fuller's jacket, the ten-minute detention was not unreasonable under the totality of the circumstances. C.A. App. 64-65. The court explained that petitioner and Fuller were traveling on Interstate 85, a known drug corridor, and that they told Robinson they were coming from Atlanta, which was a known drug source city. *Ibid.* They also told Robinson that they had stayed in Atlanta only overnight, even though the reasons they had given for the trip—house-

hunting and job-hunting—would have seemed to merit a longer stay. *Id.* at 65. Moreover, Fuller had behaved nervously when asked about her license and the car's registration, and petitioner had made suspicious movements inside the car both before and after Robinson questioned Fuller outside the vehicle. Also, the vehicle was rented, and Robinson was concerned that there might be weapons in it; indeed, when Robinson retrieved Fuller's jacket, he patted it down for weapons before giving it to her. Following Robinson's statement to Fuller that he smelled burnt marijuana, she admitted that she had smoked marijuana earlier in the day and that half of a marijuana cigarette was still in the car. *Ibid.* At that point, the court explained, Robinson "clearly had probable cause that the vehicle contained contraband that justified his search of the vehicle," including the bag found on the backseat, which had contained the pills and the baggies, and the cocaine in the trunk. *Id.* at 65-66.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A2. The court held that "the district court did not err in concluding the evidence was admissible," and it "affirm[ed] on the reasoning the court articulated at the hearing on the motion to suppress the evidence." *Id.* at A2 (citing *Whren* v. *United States*, 517 U.S. 806, 813 (1996), and *United States* v. *Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993), cert. denied, 511 U.S. 1006 (1994)).

ARGUMENT

1. Petitioner argues (Pet. 4-5) that the district court should have suppressed the evidence seized from the rental vehicle because the officer's initial stop of the vehicle was "pretextual." That contention lacks merit. In *Whren* v. *United States*, 517 U.S. 806 (1996), this

Court held that the stop of a car where the police had probable cause to believe that the driver had committed a civil traffic violation did not offend the Fourth Amendment, even if the stop was "pretextual" in the sense that the officer was motivated by some additional law enforcement objective. See *id.* at 813 ("a traffic-violation arrest * * * [will] not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search'") (quoting *United States* v. *Robinson*, 414 U.S. 218, 221 n.1 (1973)); see also *Arkansas* v. *Sullivan*, 121 S. Ct. 1876, 1878 (2001) (per curiam) (reaffirming *Whren*). The court of appeals therefore correctly relied on *Whren* in affirming the district court's denial of petitioner's motion to suppress. Pet. App. A2.[2]

2. Petitioner further argues (Pet. 5-8) that officer Robinson lacked authority under state law to stop the vehicle because Fuller's driving did not violate South Carolina Code Annotated § 56-5-1900(a) (Law Co-op. 1991). Petitioner also relies on *United States* v. *Gregory*, 79 F.3d 973, 978 (10th Cir. 1996), in which the court of appeals held that an isolated incident of a vehicle's crossing into the emergency lane in the particular circumstances of that case did not constitute

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[2] Petitioner relies on *United States* v. *Miller*, 821 F.2d 546, 549 (11th Cir. 1987), in which the court of appeals ruled a traffic stop unconstitutional because, in its view, "a reasonable officer would not have stopped Miller absent some other motive" than that he "strayed over the white line a few inches for a few seconds." That decision was issued before this Court's decision in *Whren*. Indeed, the Eleventh Circuit has recognized that "in *Whren* * * * the Supreme Court rejected our former approach and held that the constitutional 'reasonableness' of a traffic stop is determined irrespective of 'intent,' either of the individual officer involved * * * or any theoretical 'reasonable officer.'" *Riley* v. *City of Montgomery*, 104 F.3d 1247, 1252 (1997).

a traffic offense under Utah law. The issues of state traffic law raised by petitioner do not merit the attention of this Court. Cf. *Salve Regina College* v. *Russell*, 499 U.S. 225, 235 n.3 (1991) (describing "several cases in which this Court declined to review *de novo* questions of state law" as resting on "the manner in which this Court chooses to expend its limited resources"); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499, 500 (1985) (noting Court's general deference to interpretation of state law by district courts and courts of appeals).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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